LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
APR 25 1972
MICHAEL RODAK, JR., CLERK

No. 71-1238

In the Supreme Court of the United States

OCTOBER TERM, 1971

ALAN KLAES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1238

ALAN KLAES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged in a two-count indictment filed in the United States District Court for the Southern District of Florida with the smuggling and sale of marijuana (21 U.S.C. (1964 ed.) 176a) and the purchase and sale of cocaine (26 U.S.C. (1964 ed.) 4704(a)). After filing a motion to dismiss the indictment on the ground that it was based solely on hearsay evidence when non-hearsay evidence was available, petitioner pleaded nolo contendere to the

count charging an offense under 26 U.S.C. 4704(a). Petitioner was sentenced to imprisonment of two and one-half years. The court of appeals affirmed *per curiam* (Pet. App. A). Pursuant to a stipulation, entered into prior to the plea, petitioner had reserved the right to raise the issue on appeal.

Petitioner, as in the court below, argues that the indictment was invalid because founded on hearsay testimony of a narcotics agent. The argument is without merit. In *Costello* v. *United States*, 350 U.S. 359, this Court refused to "establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence." Mr. Justice Black, writing for a unanimous Court, observed that there were no persuasive reasons advanced for establishing such a rule and that its adoption "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change" (350 U.S. 364).

Contrary to petitioner's argument, the recent amendment to 18 U.S.C. 3500, which permits defendants to obtain the grand jury testimony of a trial witness after the completion of the direct examination, does not warrant re-examination of the *Costello* decision. The amendment to 18 U.S.C. 3500 merely codified what had by and large become the general practice of permitting defendants to use grand jury minutes for impeachment purposes. *Dennis* v. *United States*, 384 U.S. 855. And the argument advanced

here, that indictments based upon hearsay evidence frustrate the policy of disclosure, has been rejected by the very decisions of the Court of Appeals for the Second Circuit upon which petitioner relies. In *United States* v. *Payton*, 363 F. 2d 996 (C.A. 2), certiorari denied, 385 U.S. 993, the court of appeals sustained the validity of an indictment based on hearsay. In so doing, the court said (363 F. 2d 999):

> There is no doubt that under proper circumstances, defendants are allowed access to grand jury minutes for the purpose of pointing out inconsistencies with trial testimony, Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 LEd.2d 973 (1966), and cases cited in id. n. 21, and there is no possibility of doing this with a trial witness who did not testify before the grand jury. However, appellant has taken a rule of access formulated to expose inconsistencies and has turned it upside down to prove a requirement that a witness appear before a grand jury so that an inconsistency may be created. This argument is a non sequitur. We will continue to hold, of course, that a defendant may prove inconsistencies at trial with prior statements to a grand jury; we do not hold that a defendant may require prior statements to a grand jury simply to create inconsistencies at trial. * * *

The Court of Appeals for the Second Circuit has consistently held that "[i]ndictments obtained principally or wholly upon the basis of hearsay evidence, even though direct testimony was available, will not be dismissed unless it appears that dismissal is required to protect the integrity of the judicial process."

United States v. *Leibowitz*, 420 F. 2d 39, 42 (C.A. 2). Such circumstances may arise either when the grand jury is deliberately misled into thinking it is getting eyewitness testimony or when the defendant is able to demonstrate a "high probability" that with eyewitness testimony rather than hearsay testimony the grand jury would not have indicted (*ibid.*). *United States* v. *Catalano*, 439 F. 2d 1100, 1102 (C.A. 2); *United States* v. *Rosenstien*, 434 F. 2d 640, 641 (C.A. 2). The petitioner does not suggest that either of those circumstances is present in this case. Moreover, with respect to count II of the indictment, the only count to which petitioner pleaded nolo contendere and the only count on which he was convicted, the evidence before the grand jury was not based on hearsay but on the eyewitness testimony of the United States Customs Agent who found the cocaine in petitioner's home at the time of the arrest. Transcript of Proceedings on Motion to Dismiss, May 11, 1971, pp. 33-35; Grand Jury Minutes, January 20, 1971, p. 21.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

---

[1] The Grand Jury Minutes were marked as Exhibit 2 at the hearing on the motion to dismiss (Tr. 11-12).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 463739 681